UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

ADI WORLDLINK, LLC; SAMSUNG ELECTRONICS AMERICA, INC. f/k/a/ SAMSUNG TELECOMMUNICATIONS AMERICAS, LLC

Respondents

and

CASE 07-CA-157722

TIM CURRY, OZIAS FOSTER, ROYCE ELLISON, MERVIN L. MCGIRT, CLARENCE COOK, KEVIN ASTROP, Individuals

Region 7 Charging Parties

and

CASE 20-CA-156284

NATHAN NESBIT, CHRIS CARETHERS, LAMAR HALL, LEON TOWNSEND, STEVEN LE, SEAN GOODSON, Individuals

Region 20 Charging Parties

CHARGING PARTIES' BRIEF IN SUPPORT OF SUMMARY JUDGMENT

Charging Parties write separately to point out two specific issues with the arbitration clause at issue to the Board that have not been specifically addressed by other briefing:

1. The arbitration clause has been used to prohibit joinder of parties in violation of the National Labor Relations Act; and

2. The cost provisions in the arbitration clause that purport to shift arbitration costs on to Charging Parties contain coercive language that violates Section 7.

I. CHARGING PARTIES SEEK FOR THE BOARD TO STATE ALTERNATIVELY THAT ITS RULING IS BASED ON THE RESPONDENTS' BAN OF CHARING PARTIES JOINING TOGETHER.

The focus of jurisprudence with regard to the Board's determination in *D.R. Horton* has focused on class and collective actions, while mainly ignoring the issue of joinder. In the event that a hostile Circuit becomes the venue for the appeal of this case, *Charging Parties urge that the Board clearly hold that Respondents' activities violated Section 7 by prohibiting joinder*.[1] The cases of Tim Curry, Ozias Foster, Royce Ellison, Mervin McGirt, Clarence Cook, and Kevin Astrop were filed together in a single arbitration. The arbitrator forcibly severed those cases at the urging of WorldLink into individual actions based on the language in the arbitration clause.

The action of Respondents in seeking severance of these cases are a clear violation of Section 7. The Supreme Court and every Circuit Court that has ever considered the issue has stated that employees have an NLRA § 7 right to join together in litigation. *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565-67, 98 S.Ct. 2505, 2512-13 (1978) ("it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and **judicial** forums") *Glendale Assocs., Ltd. v. NLRB,* 347 F.3d 1145, 1153 (9th Cir. 2003) ("Section 7 protects the right of employees 'to improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship.'"); *Altex Ready Mixed Concrete Corp. v. NLRB,* 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by **employees** of a labor related civil action is protected activity under section 7 of the NLRA"); *Brady v. Nat'l Football League,* 644 F.3d

[1] Charging parties urge that this ground be stated clearly as an alternate ground for ruling with separate analysis from the analysis that regards class and collective action rights. Even Fifth Circuit precedent supports a ruling on this ground by the Board. *Altex Ready Mixed Concrete Corp. v. NLRB,* 542 F.2d 295, 297 (5th Cir. 1976)

661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a **group** of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under Section 7") *Leviton Mfg. Co. v. NLRB,* 486 F.2d 686, 689 (1st Cir. 1973) ("the filing of a labor related civil action by a **group** of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith")

Much of the Fifth Circuit's argumentation in *D.R. Horton* does not apply in the context of joinder. The Fifth Circuit for example argued that class action procedures did not exist until after the NLRB was passed. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344, 362 (5th Cir. 2013). However, permissive joinder clearly predates the passage of the NLRA. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) ("permissive joinder of parties, for instance, had long been part of Anglo-American civil procedure and was encouraged in 19th-century federal courts.") The *Concepcion* based objections of the Fifth Circuit that class arbitration strips arbitration of its fundamental attributes also do not apply to joinder. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344, 360 (5th Cir. 2013).

Joinder in fact would make arbitration more efficient of a procedure for the resolution of related employment law claims. Compelling individual arbitrations as has been done here does not lead to efficient adjudication and is likely to lead to inconsistent adjudication of claims. The case that Region 7 Charging Parties were part of had 23 individuals when it was severed. The case is currently proceeding as 23 separate individual arbitrations. Had the Section 7 joinder rights of the Charging Parties been upheld, the arbitrator could have determined that the cases could proceed as one action involving 23 cases or in separate subgroups as the arbitrator deemed appropriate. The arbitrator could have decided how the cases could proceed most efficiently.

Instead, the cases were severed resulting in inefficient litigation of 23 separate cases involving many of the same legal issues and witnesses.

II. THE COST SHIFTING PROVISIONS IN THE ARBITRATION CLAUSE SHOULD BE HELD TO BE A SECTION 7 VIOLATION BY THE BOARD.

Respondent Worldlink stipulates that the arbitration clause at issue states that:

> The party seeking Arbitration will initially pay the arbitrator and facility fees relating to the arbitration.

(Worldlink Response, p. 2). This type of provision is deemed to be so coercive that it is in fact illegal in the state of California. In *Armendariz*, the California Supreme Court held that "consistent with the majority of jurisdictions to consider this issue, we conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Armendariz v. Found. Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000) (emphasis added).

Charging Parties urge the Board to adopt California's rule with regard to costs that can be imposed or threatened against an employee when employees are engaged in concerted activity by filing suit. Here the clause is a violation of Section 7 because it threatens to impose costs greater than those imposed in Court on employees therefore seeking to coerce, interfere, or restrain employees from taking concerted action.

Respectfully submitted,

/Hessam Parzivand/

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